

Workgroup #3 Blueprint for Dealing with Fiduciary/Attorney Fee Issues

The first five bullet-points of this blueprint were vetted at the last two meetings and reflect the consensus or majority position of Workgroup #3.

- **COST VERSUS BENEFIT:** In any Title 14 proceeding, the fiduciary and attorneys shall prudently manage costs and timely disclose if any projected costs may exceed the probable benefits to the ward, protected person, decedent's estate, or trust, and when appropriate, consistent with due process, the court shall enter or modify such orders as may protect the ward, protected person, decedent's estate, or trust against costs that exceed benefits. This analysis does not require selection of the lowest cost provider, if reasonable cause exists for the selection.
- **TRANSPARENCY ON FEES:** In any Title 14 proceeding, any fiduciary, attorney or guardian *ad litem* (GAL), who intends to be paid by the estate, shall disclose the basis for their fees (e.g., rate schedule) at the time of their first appearance in the action, such as a petition for appointment, notice of appearance, or acceptance of appointment. Fee changes following appointment are implemented in the same manner as budget approval.

Licensed fiduciary firms shall also post the basis for their fees (e.g., rate schedule) and uniform firm biographical information at a common location, TBD, so the information is readily available for the public and practitioners. *Current discussion point: what is the common location for posting firm information, and what is included in the posting?*

- **LOYALTY OF COUNSEL:** An attorney shall not be or remain appointed as an attorney or GAL for the proposed ward or protected person, if that attorney has an existing attorney-client relationship with the nominated or appointed fiduciary.

Absent good cause (such as a prior attorney-client relationship between an attorney and the proposed ward or protected person), a nominated or appointed fiduciary, the petitioner or their attorney, should not recommend or nominate the appointment of a named attorney or GAL for the proposed ward or protected person.

In any conservatorship proceeding, unless otherwise ordered by the court, counsel for the protected person shall continue to represent the protected person for the duration of the conservatorship, until and unless the court finds that the cost of continued representation exceeds the probable benefit. Counsel for the protected person shall be reasonably and timely compensated for post-appointment representation, may rely on the integrity of the financial reports of the conservator, but shall bring concerns and objections to the court's attention.

- **PREDICTABILITY OF COSTS (BUDGETS):** Unless otherwise ordered by the court, a conservator shall file a proposed annual operating budget for unrestricted assets, which shall include line-items for any compensation or reimbursement to any fiduciary, attorney and/or GAL who intends to be paid by the estate. The proposed first year budget shall be filed no later than the time for filing an inventory, and the proposed budget for any subsequent year shall be filed no later than the deadline for the annual accounting. A proposed budget shall list the general categories of income and expense, in a format approved by the court, which shall be served (typically by mail) on any person entitled by law to an annual accounting.

Unless otherwise ordered by the court, a proposed budget is approved as filed, without hearing, unless an interested person files a written objection within fourteen (14) days of service of the proposed budget. In the case of an objection, or upon the court's own motion, the court may adopt, modify or reject the contested budget category, but any uncontested budget category is approved. To amend a budget, the conservator must give notice within thirty (30) days of projecting that any expenditure category will deviate more than (the greater of 10% or \$2,000) from the approved budget, and an amendment shall be approved in the same manner as the original budget.

When considering the annual accounting of a conservator, the burden is on the conservator to show good cause for deviating more than (the greater of 10% or \$2,000) from any approved budget expenditure category, but expenditures that are within this parameter are presumed reasonable and necessary, while expenditures that exceed this parameter are presumed not reasonable or necessary. This presumption is rebuttable by a preponderance of evidence.

- **MARKET FORCES:** Market forces are a proper consideration by the court during the initial court-appointment of any fiduciary or attorney, the hearing on any budget objection, and any request to substitute a court-appointed fiduciary or attorney.

The following portion of this blueprint is not yet vetted by the Workgroup, such that it may not reflect the consensus or majority position of Workgroup # 3

- **FEE GUIDELINES:** Establish guidelines to help court and parties assess whether fiduciary and attorney fees are reasonable. Guidelines are to be used as a reference point. The fiduciary fee guidelines will address some of the "hot" issues, such as whether a fiduciary may charge for clerical tasks and, if so, under what circumstances, so that fees and costs are comparable between fiduciaries and attorneys. *Current discussion points: in addition to the continuing effort to draft the guidelines, should the Workgroup recommend for or against any proposals to set or limit hourly rates, as well as any percentage-based mathematical models; should the guidelines provide/allow for flat fees; how do the guidelines intersect with contract provisions in trusts?*

- **SUMMARY REPORT:** Revise the current annual accounting forms with a summary report and supplemental schedules, which reflect the categories of income and expense that are included in the approved budget, including the actual operating results of the prior period, the budget and actual results for the period just ended (including a summary of any payables), the proposed budget for the period just beginning, and the projected income and expenses in the following period. Such a report will show trends, actual performance in relation to budgets, and assist with long-term planning. This summary report shall be supplemented by the inventory and a transaction log grouped by categories that correspond to the summary report, essentially reorganizing the information provided in the current annual accounting forms so it is more informative. The summary report should provide a history of current year budget amendments.
- **APPLICATION DEADLINE:** Establish a statute of limitations for requests to approve compensation by fiduciaries, attorneys, and guardians *ad litem*, including earned but unpaid fees. *Current discussion points: in what Title 14 proceedings should this apply; and should periodic billings to interested parties be required and if so, at what frequency?*
- **FEE-SHIFTING:** Enact general fee-shifting statute for unreasonable conduct.
- **FIDUCIARY REMOVAL OR SUBSTITUTION:** Amend the fiduciary removal statutes so they are consistent in the standards for replacing a fiduciary regardless of the type of fiduciary. Allow court to substitute a guardian or conservator if such substitution is in the ward/protected person's best interest (without requiring a showing of misfeasance or malfeasance).
- **TRAINING FOR JUDICIARY, COUNSEL, & NON-LICENSED FIDUCIARIES:**